88-535

No.

Supreme Court, U.S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM 1988

LOCAL FREIGHT DRIVERS, LOCAL 208, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

VS.

ROZAY'S TRANSFER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Do federal courts possess jurisdiction under Section 301 of the Labor-Management Relations Act to adjudicate actions challenging the validity of collective bargaining agreements?

2. Does the National Labor Relations Board possess exclusive primary jurisdiction to adjudicate the extent and effect of bargaining obligations imposed upon contracting parties by the National Labor Relations Act?

3. Is a union legally obligated to disclose to an employer material information concerning the employer's obligation to make contributions to an ERISA trust fund and, if so, may the employer reasonably rely on the union's representations regarding discretionary internal trust policy as a matter of law?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceeding below were petitioner Local Freight Drivers Local 208, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Local 208"), respondent Rozay's Transfer ("Rozay's") and *amicus curiae* Southern California District Council of Laborers, International Union of Operating Engineers, Local Union No. 12, Merchants and Manufacturers Association and the California Trucking Association.

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Petitioner,

VS.

ROZAY'S TRANSFER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Local 208 respectfully prays that a Writ of Certiorari issue to review the opinion of the Court of Appeals for the Ninth Circuit rendered in this case on June 24, 1988.

OPINIONS BELOW

Respondent Rozay's commenced litigation against Local 208 seeking rescission of a collective bargaining agreement ("contract") or, in the alternative, indemnification damages pursuant to Section 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185(a), alleging Local 208 fraudulently induced it to execute the contract.

Following a bench trial, the district court entered judgment in favor of Rozay's; rescinded the contract; and awarded Rozay's indemnification damages equivalent to the pension contributions and related monies it contractually owed the trust fund in accordance with the rescinded contract and the attorney's fees and costs it incurred in unsuccessfully defending the trust fund collection action both at trial and on appeal because of Local 208's fraudulent misconduct.

The lower court entered findings of fact and conclusions of law consistent with its judgment. (App. A, pp. A-1-A-11.)[1]

Thereafter, Local 208 timely appealed the judgment to the Ninth Circuit Court of Appeals ("Ninth Circuit").

On June 24, 1988, the Ninth Circuit affirmed the lower court's judgment in its entirety. (App. B, pp. B-1-B-34.) The Ninth Circuit's opinion is reported as *Rozay's Transfer v. Local Freight Drivers, L. 208*, 850 F.2d 1321 (9th Cir. 1988).

JURISDICTION

The decision of the Ninth Circuit was filed on June 24, 1988. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1) for review by a Writ of Certiorari.

STATUTES INVOLVED

This case directly involves Section 301(a) of the LMRA which provides:

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[1]References in this Petition to "App." refer to the Appendices attached hereto.

> "Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, . . . may be brought in any district court of the United States having jurisdiction of the parties . . . ." 29 U.S.C. § 185(a).

STATEMENT OF THE CASE

Prior to September 30, 1981, Rozay's and Local 208 were signatory to a contract which required monthly pension contributions being made on behalf of Rozay's employees to the Western Conference of Teamsters Pension Trust Fund ("Trust Fund").

After the 1978-1981 agreement expired and during continuing negotiations over the terms of a successor contract, Rozay's continued to make contributions to the Trust Fund pursuant to the terms of the 1978-1981 contract.

In July of 1982, after refusing to execute a negotiated agreed-upon successor contract, Rozay's informed Local 208 it would no longer make contributions to the Trust Fund. In September of 1982, Local 208 filed an unfair labor practice charge with the National Labor Relations Board ("NLRB") against Rozay's contending it had violated Section 8(a)(5) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(5), by refusing to execute the new three-year contract. Local 208 later amended its NLRB charge to include the contention Rozay's had unilaterally and improperly changed the terms and conditions of employment, in pertinent part, by its cessation of payments to the Trust Fund. Local 208 also filed a grievance alleging the cessation of contributions to the Trust Fund violated the 1978-1981 contract.

After the NLRB issued an administrative complaint against Rozay's and while the NLRB and grievance proceedings were pending, representatives of Rozay's and Local 208 met in January of 1983 in an effort to resolve the dispute which culminated in an alleged settlement resulting in Rozay's resuming making pension contributions to the Trust Fund.

During the January meeting, Rozay's expressed concern over being required to make retroactive pension contributions for the time period May 1982 through February 1983. As a result, representatives of Local 208 and other union officials present agreed to contact the Trust Fund on Rozay's behalf and request a waiver of Rozay's statutory and contractual obligation to pay the contributions for this time period and allegedly assured Rozay's it would not have to do so.

Following the alleged settlement, Local 208 wrote to the Trust Fund on Rozay's behalf requesting relief from paying the pension contributions for this period. On February 16, 1983, the Trust Fund voted to deny Rozay's request for relief from paying the contributions and informally apprised Local 208 of its decision in early March.

On March 8, 1983, when the new 1981-1984 contract was executed by Rozay's and Local 208, Local 208 did not advise Rozay's the Trust Fund had already voted to deny its request that the payment of the delinquent contributions be waived. Rozay's, allegedly assuming the unpaid contributions would be forgiven by the Trust Fund, signed the contract. Rozay's and Local 208 also executed a settlement agreement at the same time resolving the pending NLRB unfair labor practice and breach of contract grievance proceedings. Thereafter, consistent with

the settlement agreement, Local 208 withdrew its unfair labor practice charge and grievance.

Approximately three (3) weeks later, on or about March 24, 1983, the Trust Fund informed Rozay's it had denied its request it not have to pay the pension contributions. After learning of the Trust Fund's decision, Rozay's did not contact Local 208 for the purpose of reopening contractual negotiations; to rescind or reform the 1981-1984 contract executed on March 8, 1983; and/or to seek other additional economic relief to compensate for the Trust Fund's decision.

Subsequently, Southwest Administrators, Inc., an assignee of the Trust Fund, commenced litigation against Rozay's in federal court pursuant to Sections 301 of the LMRA and 502(a) and 515 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §§ 1132(a) and 1145, to collect the delinquent pension contributions for the time period May 1982 through February 1983. *See Southwest Administrators, Inc. v. Rozay's Transfer, Inc.* (*"Southwest Administrators"*), 791 F.2d 769, 771-72 (9th Cir. 1986), *cert. den.*, ___ U.S. ___, 107 S.Ct. 951 (1987).

Following a bench trial in *Southwest Administrators,* the district court concluded Local 208 fraudulently induced Rozay's to sign the 1981-1984 contract by failing to disclose the Trust Fund's adverse decision at the time the contract was executed and held there was no meeting of the minds between the contracting parties at that time on the question of whether the unpaid retroactive pension constributions were to be made.

Nevertheless, the district court concluded Local 208's fraudulent misrepresentation was not a defense to the Trust Fund's right to recover the unpaid contributions

required by the express terms of the contract and, as a result, entered judgment for Southwest Administrators against Rozay's for the amount of the retroactive pension contributions, liquidated damages, interest and the attorney's fees incurred by Southwest Administrators in prosecuting the case. *Id.* at 772.

Later, after learning of Local 208's alleged misconduct and appealing the adverse judgment in *Southwest Administrators* to the Ninth Circuit, Rozay's filed a separate action against Local 208 relying upon Section 301 seeking rescission of the 1981-1984 contract and indemnification damages.

After a bench trial before the same judge who decided *Southwest Administrators,* the district court concluded Local 208 was guilty of fraudulent misrepresentation in failing to inform Rozay's of the adverse trust decision on March 8, 1983 when the 1981-1984 contract was executed; rescinded the contract; and awarded Rozay's the indemnification damages it requested.

Later, the Ninth Circuit affirmed the lower court's decision in *Southwest Administrators,* concluding Local 208's misrepresentation constituted only fraud in the inducement rendering the 1981-1984 contract "voidable" rather than "void" as against the Trust Fund and, as a result, Rozay's was contractually obligated to pay the pension contributions required by the express terms of the 1981-1984 contract. *Id.* at 775.

Subsequently, the Ninth Circuit affirmed the lower court's decision in this case concluding the district court possessed jurisdiction under Section 301 to rescind the 1981-1984 contract and fashion a "make whole" remedy compensating Rozay's for the damages it suffered attributable to the fraudulent misrepresentation and bad faith

bargaining misconduct engaged in by Local 208 when the 1981-1984 contract was executed on March 8, 1983; evaluated the bargaining history and concluded Local 208 had fraudulently induced Rozay's to sign the contract; declared Local 208 had the legal duty to disclose the Trust Fund's adverse decision to Rozay's at the time the contract was signed and could he held liable for intentionally failing to disclose such; and determined Rozay's and Local 208 orally reached agreement on January 17, 1987 extinguishing Rozay's obligation to make the retroactive contributions consistent with the 1978-1981 contract. *See* 850 F.2d at 1326-37.

REASONS FOR GRANTING THE WRIT

I.

THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS RENDERED BY OTHER CIRCUITS WHICH HAVE HELD FEDERAL COURTS DO NOT POSSESS JURISDICTION UNDER SECTION 301 TO ADJUDICATE ACTIONS CHALLENGING THE VALIDITY OF COLLECTIVE BARGAINING AGREEMENTS.

In concluding the lower court possessed jurisdiction to entertain Rozay's complaint seeking rescission of the contract and other equitable relief, the Ninth Circuit declared Section 301 "applies not only to suits for breach of a collective bargaining agreement once it is duly formed, but also to suits impugning the existence and validity of a labor agreement." [Case citations omitted.] 850 F.2d at 1326. As a result, the Ninth Circuit determined "the district court had jurisdiction under LMRA § 301 to entertain this action alleging fraudulent inducement in the formation of the agreement." *Id.*

Circuit courts are sharply split on the question of whether federal courts may address challenges to the validity of collective bargaining agreements under Section 301. Although the Second, Fifth, Tenth and Eleventh Circuits have rendered decisions seemingly consistent with the Ninth Circuit in this case, the First, Third, Fourth, Sixth and Seventh Circuits have issued opinions which directly and irreconcilably conflict with the Ninth Circuit's holding a federal court possesses jurisdiction under Section 301 to determine the validity/seek the rescission of a contract and/or award other appropriate equitable relief.[2]

Decision rendered in other circuits which directly conflict with the Ninth Circuit's opinion in this regard include *Hernandez v. National Packing Co.*, 455 F.2d 1252, 1253 (1st Cir. 1972) (no jurisdiction under Section 301 to challenge the validity of a contract); *Adams v. Budd Co.*, 349 F.2d 368 (3d Cir. 1965); *Leskiw v. Local 1470, International Brotherhood of Electrical Workers*, 464 F.2d 721 (3d Cir. 1972); and *Local 435, etc. v. General Motors Corp.*, 552 F.Supp. 395, 397-98 (D. Del. 1982), *modified on other grounds*, 720 F.2d 664 (3d Cir. 1983) (Section 301 only applies to cases which involve an alleged breach of contract); *A.T. Massey Coal Co., Inc. v. Intern. Union*, 799 F.2d 142, 146 (4th Cir. 1986), *cert. den.*, ____ U.S. ____, 107 S.Ct. 1964 (1987) (jurisdiction does not exist under Section 301 to allege the parties are not bound to a contract — a breach of an existing contract must be alleged); *Mengel Co. v. Nashville Paper Products and*

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[2]Although this court has not directly addressed this question, it has concluded Section 301's companion statute, Section 303 of the LMRA, 29 U.S.C. § 187, is limited to the recovery of actual, compensatory damages suffered. *See Local 20, Teamsters, Chauffeurs and Helpers Union v. Morton*, 377 U.S. 252, 260 (1964).

Specialty Workers Union, 221 F.2d 644, 647 (6th Cir. 1955); and *NDK Corporation v. Local 1550 of the United Food & Commercial Workers International Union*, 709 F.2d 491, 493 (7th Cir. 1983) (court does not posssess jurisdiction under Section 301 to rescind a contract where the validity of the contract was the ultimate issue and it was alleged the execution of the contract was procured by the union's fraudulent misrepresentation) and *Local 481 v. Sign-Craft, Inc.*, ____ F.2d ____, 128 LRRM 3070 (7th Cir. 1988) (no Section 301 jurisdiction over complaint alleging company repudiated the contract where the ultimate question was the contract's validity).

The First, Third, Fourth, Sixth and Seventh Circuits in the above cases essentially adhered to the plain language of Section 301 in determining that although Section 301 provides jurisdiction in suits alleging a violation of a valid contract, it does not afford jurisdiction in actions challenging the validity of a contract where the contract's validity is the ultimate issue in the litigation.

The Second, Fifth, Tenth and Eleventh Circuits, consistent with the Ninth Circuit's holding in this case,[3] have

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[3]Within the Ninth Circuit itself, this issue has been decided inconsistently. *Compare Alvares v. Erickson*, 514 F.2d 156, 161 (9th Cir.), *cert. den.*, 423 U.S. 874 (1975) (allegation of breach of contract is essential element in stating cause of action under Section 301); *Milk Drivers & Dairy Employees Union v. Vevoda*, 772 F.2d 530, 532-33 (9th Cir. 1985), *cert. den.*, 475 U.S. 1036 (1986) (claim of fraudulent inducement raised in defense of union collection case brought under Section 301 is preempted); and *Lumber Prod. Indus. v. W. Coast Indus. Rel.*, 775 F.2d 1042, 1045 (9th Cir. 1985) (no jurisdiction under Section 301 to remedy tort action alleging breach of prospective contractual relations "if a crucial element of . . . [the] action is identical to an element of an unfair labor practice that is arguably covered by the NLRA. . . .") with *West Coast Tel. Co. v. Local U. No. 77 Int. Bro. of Elec. Wkrs.*, 431 F.2d 1219, 1222 (9th Cir. 1970) (court has jurisdiction under Section 301 to reform contract

declared it is not necessary to allege a violation of an existing contract in order to invoke the court's jurisdiction under Section 301 and federal courts can properly rely upon it in entertaining actions seeking rescission of the contract, declaratory and other appropriate equitable relief. *See Black-Clawson Co. v. International Ass'n. of Mach.*, 313 F.2d 179, 182 (2d Cir. 1962) ("We find nothing in the [legislative] history of Section 301(a) which indicates an intention to restrict that section to suits for damages or specific enforcement"); *United Steelworkers v. Rome Industries, Inc.*, 437 F.2d 881, 882 (5th Cir. 1970) (court possesses jurisdiction to determine the validity of a contract and a party need not allege a violation of it in order to obtain a declaration of its contractual rights); *McNally Pittsburgh, Inc. v. Intern. Iron Workers*, 812 F.2d 615, 617-19 (10th Cir. 1987) (court has jurisdiction under Section 301 to render declaratory judgment); and *Board of Trustees v. Universal Enterprises, Inc.*, 751 F.2d 1177, 1184 (11th Cir. 1985) (court has jurisdiction under Section 301 to determine if a valid collective bargaining agreement exists.). *See also, Associated Gen. Con. of A., Inc., Okl., etc. v. Laborers Int. U.*, 476 F.2d 1388, 1402 n. 25 (Temporary Emergency

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even if it involves conduct which arguably constitutes unfair labor practice); *J.S. Griffith Const. v. United Bro. of Carpenters*, 785 F.2d 706, 712-13 and n. 6 (9th Cir. 1986) (court distinguishes earlier First, Seventh and Ninth Circuit decisions holding jurisdiction does not exist under Section 301 in suits not alleging a breach of contract but litigating the validity of the contract itself because, in those cases, the facts were such the NLRB could have decided the issues presented); and *Intern. Broth. of Elec. Wkrs., 532 v. Brink Const.*, 825 F.2d 207, 212 (9th Cir. 1987) (court, citing *Griffith Const., supra*, as support, declares it possesses jurisdiction under Section 301 to resolve a contract's existence and validity as well as whether it has been breached unless it requires resolution of an issue within the exclusive jurisdiction of the NLRB.).

Court of Appeals 1973) ("The question of whether a collective bargaining agreement has been validly entered into in the first instance have been held to be so related to the subject of 'suits for violation of' labor contracts as to permit their resolution by district courts by virtue of § 185 ....").

Because of the significant split in the circuit courts as to whether Section 301 is limited to actions complaining a valid collective bargaining agreement has been breached, Local 208 requests this court grant this petition and bring about uniformity of decision on this jurisdictional issue.

II.

THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS RENDERED BY OTHER CIRCUITS WHICH HAVE HELD THE NLRB POSSESSES EXCLUSIVE PRIMARY JURISDICTION TO ADJUDICATE THE EXTENT AND EFFECT OF BARGAINING OBLIGATIONS IMPOSED UPON CONTRACTING PARTIES BY THE NATIONAL LABOR RELATIONS ACT

Relying upon Section 301, the Ninth Circuit concluded federal courts possess jurisdiction to rescind collective bargaining agreements and award indemnification damages and other equitable relief if it is factually demonstrated one contracting party fraudulently induced the other contracting party to execute the contract, conduct which the Ninth Circuit conceded constituted bad faith bargaining and an unfair labor practice. *See* 850 F.2d at 1326.[4]

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[4]*See e.g., Penntech Papers,* 263 NLRB No. 33 (1982) (company committed unfair labor practice by making false and misleading statements concerning the future of its plant if it closed) and *Eastern*

This court long ago declared federal courts do not have jurisdiction to pass upon the propriety of conduct that is arguably subject to Sections 7 or 8 of the National Labor Relations Act ("NLRA"), 28 U.S.C. §§ 157 and 158, and must defer to the competence and expertise of the NLRB to address and remedy such complaints. *See San Diego Building Trades Council v. Garmon* ("*Garmon*"), 359 U.S. 236, 245 (1959) and *Kaiser Steel Corp. v. Mullins,* 455 U.S. 72, 83 (1982).

The NLRB possesses exclusive jurisdiction over activities that threaten to interfere with national labor policy and was entrusted by Congress the task of administering labor policy in order "to avoid conflicting regulation of conduct by various official bodies" and to promote a consistent unified development of national labor policy. *Garmon, supra,* 359 U.S. at 242-45 and *Amalgamated Association of Street, Electrical Railway & Motor Coach Employees v. Lockridge,* 403 U.S. 274, 285-86 (1981).

Although "Congress recognized the need for an administrative agency having the necessary specialized knowledge and cumulative experience to resolve conflicts associated with this nation's industrial relations," *Lumber Prod. Indus., supra,* 775 F.2d at 1045, *citing Garmon, supra,* 359 U.S. at 242, two (2) exceptions to the general rule of exclusive NLRB jurisdiction have been judicially carved out.

If the activity constitutes an unfair labor practice and also allegedly violates a valid collective bargaining agreement, federal courts and the NLRB exercise concurrent

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Market Beef Processing Corp., 269 NLRB No. 19 (1981) (employer engaged in unfair labor practice by disguising and misinforming the union concerning its relocation plans).

jurisdiction. *Smith v. Evening News Association,* 371 U.S. 195, 197 (1962).

Secondly, "federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies . . . ." *Laborers Health & Welfare Tr. v. Adv. Light Con.*, ____ U.S. ____, 108 S.Ct. 830, 832-33 n. 4 (1988), *quoting with approval, Connell Construction Co. v. Plumbers & Steamfitters,* 421 U.S. 616, 626 (1975).[5]

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[5]In *Adv. Light Con., supra,* this court remarked that "whether an employer's unilateral decision to discontinue contributions to a pension plan constitutes a violation of the statutory duty to bargain in good faith is the kind of question that is routinely resolved by the administrative agency with expertise in labor law", the NLRB. 108 S.Ct. at 837.

Acknowledging that "situations in which district judges must occasionally resolve labor issues . . . represent the exception rather that the rule," this court stated cases concerning whether and when an impasse had been reached in collective bargaining negotiations and whether an employer's decision to discontinue contributions to a pension plan constitutes an unfair labor practice are the type of issues "federal courts typically defer to the judgment of the NLRB." [Case citation omitted.] *Id.*

Similarly, the questions and issues raised in this case (whether Local 208 fraudulently induced Rozay's to sign the contract; whether Rozay's detrimentally relied upon the fraudulent misrepresentation; whether Rozay's detrimental reliance was reasonable; and whether Rozay's would have been statutorily and contractually obligated to pay the delinquent pension contributions but for the fraudulent misrepresentation necessitated scrutinizing the collective bargaining history and represent the kinds of questions and issues routinely brought to and resolved by the NLRB, the administrative agency who possesses the expertise in resolving bad faith bargaining disputes such as the instant one.

This is why the Ninth Circuit was unable to find any judicial precedent for the proposition an union has a legal duty to disclose to

In this case, the Ninth Circuit determined jurisdiction existed under Section 301 to address an issue which was not predicated upon alleged violation of a valid contract or collateral or secondary to other primary issues raised (Local 208 fraudulently inducing Rozay's to sign the contract) and, as a result, rescission of the contract and indemnification damages were warranted.

The Ninth Circuit's conclusion the NLRB did not possess exclusive jurisdiction to address and remedy Rozay's fraudulent inducement claim Local 208 engaged in bad faith collective bargaining directly conflicts with decisions rendered by other circuits on the subject. *See Lexington Cartage v. Intern. Broth. of Teamsters*, 713 F.2d 194, 195 (6th Cir. 1983) (court does not possess jurisdiction under Section 301 to adjudicate the extent and effect of bargaining obligations imposed upon employers and unions by the NLRA) and *Mo-Kan Teamsters Pension Fund v. Creason*, 716 F.2d 772, 775 (10th Cir. 1983), *cert. den.*, 464 U.S. 1045 (1984) (union's lack of majority status can only be challenged in an unfair labor practice proceeding over which the NLRB has exclusive jurisdiction and is not a valid defense in a Section 301 action for enforcement of the contract).

The misconduct allegedly engaged in by Local 208 in this case — fraudulent misrepresentation in procuring the assent of Rozay's to the contract — is a claim that arose in common law and measured by standards of conduct and responsibility completely separate from and independent of a collective bargaining agreement. *See*

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an employer during collective bargaining material information concerning the employer's obligations to a trust fund and can be held liable under Section 301 for intentionally misrepresenting material facts relevant to the employer's pension contribution obligations. *See* 850 F.2d at 1328-1331.

Anderson v. Ford Motor Co., 803 F.2d 953, 958-59 (8th Cir. 1986), *cert. den.*, ____ U.S. ____, 107 S.Ct. 3242 (1987).

This court has counseled only the NLRB may provide affirmative remedies for unfair labor practices to ensure that in situations like the present one, courts do not engage in conduct inconsistent with the remedial scheme of the NLRA. *Kaiser Steel Corp., supra*, 455 U.S. at 86.

Since the Ninth Circuit's fashioning a remedy for bad faith collective bargaining under Section 301 directly conflicts with decisions rendered by other circuits which have correctly held the NLRB possesses the necessary knowledge and expertise to exclusively adjudicate and resolve such disputes, this court should grant Local 208's Petition for Writ of Certiorari.

III.

THE NINTH CIRCUIT'S DECISION CONFLICTS WITH RELATED DECISIONS RENDERED IN OTHER CIRCUITS AND RAISES IMPORTANT QUESTIONS OF FEDERAL LABOR LAW WHICH SHOULD BE RESOLVED BY THIS COURT: IS A UNION LEGALLY OBLIGATED TO DISCLOSE TO AN EMPLOYER MATERIAL INFORMATION CONCERNING THE EMPLOYER'S OBLIGATION TO MAKE TRUST FUND CONTRIBUTIONS TO AN ERISA TRUST AND, IF SO, MAY THE EMPLOYER REASONABLY RELY ON THE UNION'S REPRESENTATIONS REGARDING DISCRETIONARY INTERNAL TRUST POLICY AS A MATTER OF LAW?

The Ninth Circuit's opinion is the first to expressly hold a union is legally obligated to disclose material information to an employer concerning its obligations to make contributions to an ERISA trust fund and if it fails

to do so/communicates erroneous information, the employer's reliance upon such conduct can be reasonable as a matter of law and the union held liable to it for damages on a theory of negligent or intentional misrepresentation. *See* 850_F.2d at 1328-32.[6]

Prior decisions have consistently held an employer may not detrimentally rely as a matter of law on a union's misrepresentation regarding the employer's trust fund obligations if the misrepresentation concerns a subject

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[6]Confusingly, after stating Local 208 was not contesting its "intentional failure to disclose the trust fund's adverse decision [to Rozay's] could constitute a fraudulent misrepresentation" and, therefore, was not "reach[ing] the question of whether a party has a duty to disclose material facts to another party during collective bargaining negotiations or whether a breach of such a duty will necessarily constitute actionable fraud," *Id.* at 1328, the Ninth Circuit remarked:

> "The substance of the union's argument is that it is unreasonable as a matter of law for an employer to rely on a union's representations regarding its ability to influence the trust fund, because the union cannot bind a trust fund, nor does it have a legal duty to disclose to an employer any information concerning the employer's obligations to a trust fund." *Id.* at 1329.

Clearly, Local 208 stressed to the Ninth Circuit its failure to disclose the Trust Fund's adverse decision to Rozay's on March 8, 1983 when the 1981-1984 contract was signed did not constitute fraud because it was not legally obligated to disclose the information and Rozay's alleged detrimental reliance upon its prior representation it would attempt to secure a waiver from the Trust Fund of Rozay's statutory and contractual obligation to pay the delinquent contributions was unreasonable as a matter of law because an employer cannot reasonably rely on a union's misrepresentation concerning the nature and scope of its obligations to the Trust Fund/discretionary internal trust policy because the Trust Fund is a separate and distinct legal entity over which Local 208 has no express, apparent or implied control.

over which the trust fund is exclusively vested with the power and discretion to administer and regulate, such as Rozay's request the Trust Fund waive its obligation to pay the delinquent contributions. *See Knoll v. Phoenix Steel Corporation,* 465 F.2d 1128, 1132 (3d Cir. 1972), *cert. den.,* 409 U.S. 1126 (1973) (court declared employees' reliance on union's promise they would receive lump sum pension payments was unreasonable because the authority to determine and make that decision rested solely with the pension fund); *Martin v. Hamil,* 608 F.2d 725, 729 and 730 n. 8 (7th Cir. 1979) (employer could not reasonably rely on the statements of a union business agent concerning pension eligibility when the union representative stated "he really did not know for sure . . . but to go ahead and pay until you hear from us"); *Teamsters L. 348 H. & W. Fund v. Kohn Bev. Co.,* 749 F.2d 315, 319-20 (6th Cir. 1984), *cert. den.,* 471 U.S. 1017 (1985) (employer's reliance on union representative's statement certain employees would not be eligible for benefits was unreasonable and could not support an estoppel defense because the employer knew or had a means of determining the truth of the union agent's statements and the union agent had no authority to bind or act on behalf of the trust fund and thus acted outside his authority in making the misrepresentation); *Oates v. Teamsters Affiliates Pension,* 482 F.Supp. 481, 488 (D. D.C. 1979) (justifiable reliance does not exist where the promissor is not a trustee or representative of the trust fund but merely an agent of the union without either actual or apparent authority to make the relied upon promise); *Galvez v. Local 804 Welfare Trust Fund,* 543 F.Supp. 316, 317 (E.D. N.Y. 1982) (employee could not reasonably rely upon union representative's statement he would be eligible for a pension since the union agent did not possess express, implied or apparent authority to act or speak for the trust

fund); *Chambless v. Masters, Mates & Pilots Pension,* 571 F.Supp. 1430, 1451 (S.D. N.Y. 1983) (where trust documents made clear that only trustees could obligate plan, an employee's reliance upon statement uttered by his union representative his acceptance of employment would not adversely impact on his ability to collect pension benefits was unreasonable); and *Ridens v. Voluntary Separation Program,* 610 F.Supp. 770, 777 (D. Minn. 1985) (employee could not reasonably rely upon his supervisor's comments concerning voluntary separation benefits because the supervisor had no authority to make the statements and only the program's administrator could decide if he would be granted an exception under the program).

Because this case represents a sharp departure from and is inconsistent with decisions rendered in other circuits which have uniformly held an employer may not, as a matter of law, reasonably rely upon a union's representations concerning its trust fund obligations and discretionary internal trust policy, this petition should be granted and this court should decide this important question of federal labor law and harmonize the conflicting opinions on the subject.

CONCLUSION

For all the foregoing reasons, Local 208 respectfully submits this case presents substantial federal questions for this court's review and the decision below conflicts with other circuit authority and, as a result, this Petition for Writ of Certiorari should be granted.

DATED: September 22, 1988

Respectfully submitted,

WOHLNER, KAPLON, PHILLIPS,
VOGEL, SHELLEY & YOUNG

BY ROBERT D. VOGEL
Attorneys for Petitioner
Local Freight Drivers, Local 208, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

APPENDIX A

Case No. 84 8313 MRP (Bx)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROZAY'S TRANSFER
Plaintiff,
vs.
LOCAL FREIGHT DRIVERS, LOCAL 208,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on January 14, 1986 before the Honorable Mariana R. Pfaelzer, United States District Judge, sitting without a jury. Stephen P. Pepe and Cliff Fonstein, of the law firm of O'Melveny & Myers, appeared as counsel for plaintiff, and Robert D. Vogel of the law firm of Wohlner, Kaplon, Phillips, Vogel, Shelley & Young appeared as counsel for defendant. The trial was conducted pursuant to the Pretrial Conference Order, the narrative statements of witnesses, the testimony and documentary evidence introduced at trial, and the oral arguments of counsel. The cause having been submitted to the Court for decision, the Court now makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff Rozay's Transfer ("Rozay's") is a California corporation engaged in the trucking industry in Southern California. (*See* Stipulated Fact "a" in Pretrial Conference Order ("Stipulated Fact a.")

2. The truck drivers and dock workers employed by Rozay's are now and for several years have been represented for purposes of collective bargaining by defendant Local Freight Drivers, Local 208, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Local 208") (*See* Stipulated Fact b.)

3. Rozay's and Local 208 were parties to a collective bargaining agreement ("Agreement") and an Employer-Union Pension Certification ("Certification") which expired on September 30, 1981. (*See* Stipulated Fact c.)

4. The Argument and Certification which expired on September 30, 1981 required Rozay's to make contributions to the Western Conference of Teamsters Pension Trust Fund ("Trust Fund") on behalf of employees represented by Local 208. The Trust Fund is an employee pension benefit plan within the meaning of the Employee Retirement Income Security Act. (*See* Stipulated Fact d.)

5. Rozay's made regular contributions to the Trust Fund during the life of the Agreement and Certification and continued to make contributions after the expiration and through April, 1982, while Local 208 and Rozay's attempted to negotiate a renewal Agreement and Certification. (*See* Stipulated Fact e.)

6. On or about April 18, 1982, Local 208 presented a rough draft of a new collective bargaining agreement to Rozay's. After reviewing the draft, on May 6, 1982,

Rozay's returned it unsigned to Local 208 with several corrections. (*See* Stipulated Fact f.)

7. Also on May 6, 1982, Rozay's Vice President, Richard Fletcher ("Fletcher"), raised with Local 208 Business Agent, Eddie McKiernan ("McKiernan"), Rozay's severe economic problems and explained that in order to stay in business, Rozay's would need a reduction in labor costs. Rozay's specifically proposed cessation of pension contributions, and reduced holiday, vacation, and sick leave benefits. (*See* Stipulated Fact g.)

8. On April 26, 1982, the Trust Fund wrote and informed Rozay's that it could not accept pension contributions unless there was a signed collective bargaining agreement in force between Rozay's and Local 208. (Trial Exhibit No. 11.) On June 30, 1982, the Trust Fund wrote a substantially similar letter to Rozay's. (Trial Exhibit No. 12.)

9. On June 8, 1982 Fletcher again raised the needed concessions with McKiernan and with Local 208's Secretary-Treasurer, Alex Maheras ("Maheras"). Maheras requested that Rozay's make the proposal in the form of a letter. (*See* Stipulated Fact i.)

10. On June 11, 1982, Fletcher on behalf of Rozay's wrote to Maheras to propose labor concessions. Specifically, Fletcher proposed the following: cessation of pension contributions; elimination of one week's vacation; elimination of two personal holidays; and elimination of five days' sick leave. This letter was sent via certified mail. (Trial Exhibit No. 16.)

11. Local 208 received the letter of June 11, 1982, but made no reply. (*See* Stipulated Fact k.)

12. On June 28, 1982, on behalf of Rozay's, Fletcher sent a second letter to Local 208. Fletcher stated that

having received no response to its June 11, 1982 letter, Rozay's assumed that the union had no objection to its proposed changes, and the changes would be implemented on July 6, 1982. This second letter was also sent by certified mail. (Trial Exhibit No. 17.)

13. Local 208 received Rozay's letter of June 28, 1982, but made no reply. (*See* Stipulated Fact m.)

14. Rozay's implemented the proposals outlined in its June 11, 1982 letter to Local 208 effective July 6, 1982. (*See* Stipulated Fact n.)

15. Several months after Rozay's ceased making pension contributions to the Trust Fund, Local 208 filed an unfair labor practice charge with the National Labor Relations Board (the "NLRB" or "Board"). The charge was filed on September 20, 1982 and amended on November 1, 1982, under Board Case No. 21-CA-21591. (Trial Exhibits Nos. 18, 19.) Local 208 also filed a grievance pursuant to the grievance and arbitration provisions of the expired Agreement. (Trial Exhibit No. 20.) The Board charge alleged that the cessation of the payment of pension contributions constituted an unfair labor practice, and the grievance alleged that it was a breach of the collective bargaining agreement.

16. On January 17, 1983, William S. Rozay ("Mr. Rozay"), President of Rozay's, met with Maurice E. Anderson ("Anderson"), International Vice President of the International Brotherhood of Teamsters, and Archie Murrietta ("Murrietta"), President of Local 208. The purpose of this meeting was to resolve the NLRB case then pending between Rozay's and Local 208. This meeting took place in Anderson's office. (*See* Stipulated Fact q.) At all times during his dealings with Rozay's, Murrietta was acting as agent of and on behalf of Local 208.

17. At the January 17, 1983 meeting, Rozay's and Local 208 reached a settlement of the NLRB case. Among the terms agreed to were a reduction of hourly wages by $1.00 per hour and resumption of the payment of pension contributions prospectively. The pension contributions were 98¢ per hour for each employee.

18. At this January 17, 1983 meeting, Anderson agreed to ask the Trust Fund to waive retroactive pension contributions for the period of May 1982 to February 1983. He represented to Mr. Rozay that the Trust Fund had forgiven the unpaid pension contributions of other employers under similar circumstances. (*See* Stipulated Fact r.)

19. On January 21, 1983, Mr. Rozay sent Murrietta a letter confirming the terms of the January 17, 1983 agreement. (Trial Exhibit No. 13.) Mr. Rozay stated in his letter that under the agreement, retroactive contributions would not be required. On January 26, 1983 Murrietta replied to Mr. Rozay's letter, and did not disagree with or question the statement that there would be no retroactive pension contributions. (Trial Exhibit No. 14.)

20. On January 26, 1983, Murrietta wrote a letter to the Trust Fund, requesting that Rozay's be relieved from paying pension contributions for the months of July 1982 through January 1983. He sent a copy of this letter to Mr. Rozay. (Trial Exhibit No. 1.)

21. On February 16, 1983 the Trustees of the Trust Fund met to consider, among other agenda items, whether to forgive Rozay's unpaid pension contributions for the months of May, 1982 through February, 1983. The Trustees voted not to forgive the payment of these contributions. (Trial Exhibit No. 6.)

22. On or about March 4, 1983, Michael Uranga, an employee of Southwest Administrators, the entity who administers the Trust Fund in Southern California, told Murrietta at a social gathering, a Teamsters' joint Council meeting, that the Trustees had voted not to forgive the payment of the unpaid contributions. (*See* Stipulated Fact y.)

23. On March 8, 1983, Local 208 and Rozay's executed a collective bargaining agreement (Trial Exhibit No. 4), an Employer-Union Pension Certification (Trial Exhibit No. 5), and a settlement agreement (the "Side Agreement") (Trial Exhibit No. 15) which resolved all pending disputes between Rozay's and Local 208 involving the Board charge and the grievance.

24. At the time that Murrietta and Mr. Rozay signed the March 8, 1983 collective bargaining agreement, Murrietta knew that the Trustees had voted not to forgive Rozay's unpaid contributions, but he did not disclose this fact to Mr. Rozay. The existence of an obligation to pay the $76,133.29 in unpaid contributions was a material fact. Murrietta did not disclose this fact to Mr. Rozay because he knew that if Mr. Rozay was told that the past contributions would not be forgiven, Mr. Rozay would not execute the collective bargaining agreement. Murrietta fraudulently induced Mr. Rozay's execution of the collective bargaining agreement. When he committed these fraudulent acts, Murrietta was acting as an agent of and on behalf of Local 208.

25. At the time that Murrietta and Mr. Rozay signed the March 8, 1983 collective bargaining agreement, the Employer-Union Pension Certification and the Side Agreement, there was no meeting of the minds between Rozay's and Local 208 on the issue of retroactive pension contributions. The Trustees' decision on February 16,

1983 not to grant Rozay's relief from paying the retroactive pension contributions changed the essential character and nature of the agreement which Rozay's and Local 208 reached on January 17, 1983 and which agreement Mr. Rozay believed he was executing on March 8, 1983.

26. Murrietta by not disclosing the material fact that the past due pension contributions would not be forgiven deprived Rozay's of the opportunity to renegotiate its agreement for economic relief with Local 208 or to refuse to sign the collective bargaining agreement and the Employer-Union Pension Certification and thus avoid the $76,133.29 pension liability.

27. By letter dated March 24, 1983, the Trust Fund notified Murrietta and Mr. Rozay of its decision not to forgive the payment of the unpaid contributions. (Trial Exhibit No. 2.) Rozay's first learned of the Trustees' decision through this letter.

28. On or about June 20, 1983, the Trust Fund filed an action in this Court captioned, *Southwest Administrators, Inc. v. Rozay's Transfer*, Case No. 83-4194-MRP ("*Southwest Administrators*") seeking recovery of the unpaid pension contributions, along with interest, liquidated damages, and attorney's fees. In that action, plaintiff Southwest Administrators, Inc., was the assignee and representative of the Trust Fund. (*See* Stipulated Fact ff.)

29. Rozay's did not learn of Local 208's fraudulent conduct until April 11, 1984 when in the course of litigating the *Southwest Administrators* case, Rozay's deposed Michael Uranga, a Trust official. During his deposition, Uranga admitted telling Murrietta and Anderson before the January 17, 1983 meeting that the Trust would not forgive the unpaid contributions. Uranga also disclosed

that the Trustees' decision not to forgive Rozay's unpaid contributions was made on February 16, 1983. The deposition transcript was served on the parties on April 30, 1984. After waiting thirty days for Uranga to sign the deposition, Rozay's filed, on July 6, 1984, a motion for leave to file a third party complaint against Local 208 for fraud.

30. At the trial of the *Southwest Administrators* case, on March 12, 1985, Murrietta for the first time admitted knowing of the Trustees' decision before March 8, 1983. Until March 12, 1985, Murrietta denied knowing of the Trustees' decision prior to March 8, 1983.

31. In *Southwest Administrators*, this Court held that Rozay's was liable to the Trust Fund for the unpaid pension contributions and entered judgment in favor of Southwest Administrators in the amount of $122,789.03. Added to the amount of back pension contributions ($76,133.29) was $15,226.65 in liquidated damages, $25,039.09 in interest, and $6,390.00 in attorney's fees. The interest Rozay's owes is continuing to accrue pending appeal of *Southwest Administrators*. (*See* Stipulated Fact ii.)

32. Rozay's spent approximately $22,010.37 in attorney's fees and costs defending the *Southwest Administrators* case in the district court. Rozay's has currently spent approximately $17,663.21 in attorney's fees and costs in appealing the *Southwest Administrators* case. Rozay's has currently spent approximately $9,304.89 in prosecuting the present case.

CONCLUSIONS OF LAW

1. Local 208, through its agent Murrietta, intentinonally concealed the Trustees' decision from Mr. Rozay,

knowing that this decision was a material fact which changed the essential nature of the collective bargaining agreement. Murrietta did not disclose this fact to Mr. Rozay because he knew that if Mr. Rozay was told that the past contributions would not be forgiven, Mr. Rozay would not execute the collective bargaining agreement. Mr. Rozay justifiably relied upon the intentional misrepresentation of Murrietta when signing the agreement. Such conduct on the part of Local 208 constitutes fraud. *See, e.g., Pence v. United States*, 316 (U.S. 332, 338, 62 S. Ct. 1080, 1083, 86 L.Ed. 1510, 1515 (1942) (describing elements of fraud); *Hart v. McLucas*, 535 F.2d 516 (9th Cir. 1976) (accord); *Greene v. Gibraltar Morts. Inv. Corp.*, 488 F. Supp. 177, 179 (D.C.D.C. 1980) (omission or concealment of material facts can constitute a misrepresentation, just as a positive, direct assertion can).

2. Local 208, through its agent Murrietta, by intentionally concealing the Trustees' decision from Mr. Rozay, deprived Rozay's of the opportunity to refuse to sign the collective bargaining agreement and avoid retroactive pension contributions of $76,133.92 or of renegotiating its collective bargaining agreement with Local 208.

2. Because Mr. Rozay justifiably relied on the intentional misrepresentation of Murrietta, acting as agent of Local 208, when he signed the March 8, 1983 Agreement which gave rise to Rozay's liability to the Trust, Local 208 is required to indemnify Rozay's the full amount of Rozay's damages arising from such fraud. *Great American Ins. Co. v. Evans*, 269 F. Supp. 151, 157 (N.D. Cal. 1967) (the principle behind indemnification is that everyone should be responsible for the consequences of his or her own wrong, and if others by reason of a lesser kind of liability have been compelled to pay damages, then they may recover from the real wrongdoer); *Graphic Arts*

International Union, Local No. 280 v. NLRB, 596 F.2d 909, 910 (9th Cir. 1979) (union required to make employer whole for any financial expenditures made pursuant to a labor contract coerced in violation of the National Labor Relations Act); *Moe v. Transamerica Title Ins. Co.*, 21 Cal. App. 3d 289, 303, 98 Cal. Rptr. 547 (1971) (a person who is required through the tort of another to act in protection of his interest by defending an action against a third party is entitled to recover as damages, compensation for the reasonably necessary attorneys' fees incurred). Such indemnification includes:

a. The amount of Rozay's liability to the Trust Fund in the *Southwest Administrators* case, including interest subsequently accrued;

b. Rozay's legal fees in defending the *Southwest Administrators* case in the district court;

c. Rozay's legal fees in appealing the *Southwest Administrators* case; and

4. The 1981-1984 collective bargaining agreement between Rozay's and Local 203 is null, void, rescinded and is without effect because, as a result of Local 208's fraud, there never was a meeting of the minds on the essential, material and critical issue of retroactive pension contributions. *Boeing Airplane Co. v. Aeronautical Industrial Dist. Lodge,* 188 F.2d 356, 357 (9th Cir.) *cert. denied,* 342 U.S. 821, 72 S. Ct. 39, 96 L.Ed. 621 (1951) (strike by union is material breach of collective bargaining agreement justifying employer's rescission of the agreement).

5. The Court denies Rozay's request for attorneys' fees in the present action.

6. The Court denies Rozay's request for punitive damages in the present action.

DATED: June 23, 1986

Mariana R. Pfaeizer
United States District Judge

APPENDIX B

No. 86-6544
D.C. No. CV-84-8313-MRP

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROZAY'S TRANSFER,
Plaintiff-Appellee,

v.

LOCAL FREIGHT DRIVERS, LOCAL 208,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS
OF AMERICA,
Defendant-Appellant.

OPINION

Appeal from the United States District Court
for the Central District of California
Mariana R. Pfaelzer, District Judge, Presiding

Argued and Submitted
January 5, 1988 — Pasadena, California

Filed June 24, 1988

Before: J. Clifford Wallace, Thomas Tang and
William A. Norris, Circuit Judges.

Opinion by Judge Wallace

SUMMARY

LABOR

Appeal from judgment. The court affirmed holding that an employer would not have been liable for retroactive pension fund contributions "but for" a union's fraud.

In *Southwest Administrators*, the district court found that appellee Rozay's Transfer had been fraudulently induced by appellant union president Murrietta into signing a collective bargaining agreement. The court also found that there had been no meeting of the minds on a retroactive pension fund contributions issue. Nonetheless, the district court concluded that the union's oral misrepresentation was not a defense to the trust fund's right to collect the contributions required by the express terms of the agreement. Consequently, the district court entered judgment for Southwest Administrators. This court affirmed and concluded that Rozay's was still obligated to make the contributions to the pension trust fund required by the express terms of the agreement. At the same time, Rozay's initiated a separate action against the union under section 301 of the Labor Management Relations Act for fraudulent inducement. The district court concluded that the union was guilty of fraudulent misrepresentation in procuring the apparent assent of Rozay's to the March 8 agreement and entered judgment in favor of Rozay's. In fashioning a make whole remedy, the district court rescinded the March 8 agreement, awarded Rozay's indemnification, and awarded Rozay's indemnification from the union for attorneys' fees and costs.

[1] Evidence supports the district court's factual findings of fraud. [2] Given the evidence, it was not clear error for the district court to infer that Rozay's would not have signed the existing agreement knowing that it would

be bound to make over $76,000 in retroactive pension fund contributions and that Murrietta concealed the trust fund's decision not to forgive the delinquent contributions because he realized that Rozay's would not sign the contract if he knew of the decision. [3] When Rozay's finally learned of Murrietta's fraud, it promptly interposed a contractual defense of fraudulent misrepresentation. The facts belie the union's contention that Rozay's was satisfied with the agreement even though it obligated Rozay's to make retroactive pension fund contributions. [4] Rozay's bases its claim for relief against the *union* on the *union's* intentional failure to apprise it of the existence of a material fact: the trust fund's adverse decision. [5] Rozay's amicus persuasively argues that because pension plans are a mandatory subject of bargaining and the employer must negotiate in good faith only through the union's chosen representative, it is untenable to hold that the union cannot be held liable for intentional misrepresentations regarding material facts relating to the employer's pension obligations. [6] The union has cited no authority or sound legal principle explaining why rules pertaining to fraudulent inducement should not apply to the formation of labor contracts. [7] In view of the union's inaction, the failure of the parties formally to execute the tentative November 1981 agreement, and the clearly expressed intent of Rozay's to modify this agreement in light of changed circumstances, this court fails to see how a binding agreement came into effect as of November 1981. [8] This court rejects Rozay's argument that just because an employer *may* continue contributing to a pension trust fund following the expiration of a collective bargaining agreement it does not mean that a trust fund has the *right* to sue to collect such contributions during this period. [9] Upon expiration of a collective bargaining agreement, an employer has a duty to

continue the status quo until the parties bargain to impasse or reach a new agreement. By unilaterally changing the status quo before that time, the employer commits an unfair labor practice. This obligation to maintain the status quo under the expired labor agreement applies with equal force to the obligation to continue contributing to a pension trust fund. [10] That section 8(a)(5) creates an enforceable obligation on the part of an employer to continue pension fund contributions pending renegotiation of an expired collective bargaining agreement belies the Rozay's claim that an employer is permitted, but cannot be required by the trust fund, to make such contributions during this hiatus. [11] Nonetheless, this court remains unpersuaded by the union's argument that notwithstanding Murrietta's alleged misrepresentation, Rozay's would still have been legally obligated to make the pension fund contributions for the period in question. The employer's obligation to maintain the status quo is merely presumptive in the sense that it can be discharged through the bargaining process. The parties could always have extinguished this obligation. This court sees no reason why this could not be done retroactively. [12] Union officials clearly evinced by their words and actions their intent to free Rozay's from the burden of making retroactive pension fund contributions for the period in question. Murrietta's fraud deprived Rozay's of the opportunity to negotiate away any continuing legal obligation to make the retroactive payments. [13] Section 301 allows courts to fashion remedies and in doing so, the range of judicial inventiveness under section 301 will be determined by the nature of the problem. [14] Hence, there is no sound reason why section 301 should bar the district court from simultaneously awarding a remedy of rescission and indemnification for the union's fraudulent inducement in order to make the employer whole. [15]

The union's suggestion that Rozay's was tardy in waiting over a year before formally notifying the union of the collection action initiated by the trust fund is contrary to the record. [16] There is no evidence in the record that Rozay's was remiss or dilatory in conducting discovery that would otherwise have led Rozay's to uncover Murrietta's fraudulent conduct. [17] The award of attorneys' fees and costs in this case merely compensates Rozay's for one aspect of its out-of-pocket expenses attributable to the union's fraud. Case law supports awarding attorneys' fees and costs where such expenses were incurred as a result of the defendant's own misconduct. [18] Thus, the district court did not abuse its discretion by awarding Rozay's the attorneys' fees and costs that it incurred in defending the *Southwest Administrators* lawsuit.

COUNSEL

Robert D. Vogel, Wohlner, Kaplon, Phillips, Vogel, Shelley & Young, Los Angeles, California, for the defendant-appellant.

Stephen P. Pepe, O'Melveny & Myers, Los Angeles, California, for the plaintiff-appellee.

OPINION

WALLACE, Circuit Judge:

Rozay's Transfer, an employer, brought this action against Teamsters Local 208 (union) for fraudulently inducing Rozay's Transfer to execute a collective bargaining agreement. Following a bench trial, the district court found for Rozay's Transfer and granted its prayer for rescission of the collective bargaining agreement (agreement) and for indemnification for retroactive pension

fund contributions under the agreement for which Rozay's Transfer was adjudged liable in a previous collection action brought by the pension trust fund. On appeal, the union contests not only the merits of the district court's finding of fraud, but also the district court's jurisdiction over this action and its authority simultaneously to award rescission and indemnification as a remedy. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

I

The circumstances giving rise to this lawsuit were previously detailed in our decision in *Southwest Administrators, Inc. v. Rozay's Transfer, Inc.*, 791 F.2d 769 (9th Cir. 1986) (*Southwest Administrators*), *cert. denied*, 107 S. Ct. 951 (1987), an action brought by the trust fund to collect retroactive pension fund contributions that Rozay's Transfer was obligated to make under its collective bargaining agreement with the union.

> Prior to September 30, 1981, Rozay's Transfer, an employer in the trucking industry, and Teamsters Local 208 were parties to a collective bargaining agreement. Pursuant to the agreement, Rozay's Transfer made monthly contributions on behalf of its employees to the Western Conference of Teamsters Pension Fund. This trust fund is a multiemployer pension plan as defined by subsections 3(2) and (37)(A) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002(2), (37)(A).
>
> After the agreement had expired, and while negotiations were continuing over the terms of a successor agreement, Rozay's Transfer continued to make contributions to the trust fund pursuant to the terms of the 1978-81 bargaining agreement. In July, 1982,

when no successor agreement had yet been adopted, Rozay's Transfer informed the union that it had ceased making contributions to the pension fund.

In September, 1982, Local 208 filed an unfair labor practice claim with the National Labor Relations Board (NLRB) charging Rozay's Transfer under 29 U.S.C. § 158(a)(5) with refusal to execute a collective bargaining agreement that had allegedly been negotiated. The NLRB charge was subsequently amended to include the charge that Rozay's Transfer had unilaterally altered benefits and conditions of employment, including cessation of payments to the pension fund. Local 208 also filed a grievance alleging the cessation of contributions to the trust fund violated the collective bargaining agreement.

While the NLRB charge and the grievance were pending, William S. Rozay, the owner of Rozay's Transfer, and Archie Murrietta, president of Local 208, eventually reached a settlement. Under this settlement, employee wages would be reduced by $1.00 and Rozay's Transfer would resume payments to the trust fund on behalf of each employee at the approximate rate of $.99 per hour.

In light of the company's precarious financial position, Rozay expressed serious concerns about being required to make retroactive pension fund contributions for the period between May, 1982 and February, 1983. Murrietta, and Maurice E. Anderson, the director of the Western Conference of Teamsters, agreed to contact the trust fund and request a waiver of the obligation to make contributions for this period. Murrietta and Anderson assured Rozay that the delinquent payments would be forgiven, noting that the trust fund had waived the unpaid pension contri-

butions of other employees under similar circumstances.

Murrietta wrote to the trust fund on behalf of Rozay's Transfer requesting relief from payment of contributions for this interim period. However, on February 16, 1983, the trustees of the Western Conference of Teamsters Pension Fund, voted to deny the request to forgive the unpaid contributions.

When the new collective bargaining agreement was executed on March 8, 1983, Murrietta had been informed of the trust fund's decision to deny a waiver of the delinquent contributions. He did not advise Rozay of this action. Rozay, assuming that unpaid contributions would be forgiven, signed the agreement, which covered the period from September 1, 1981 to September 30, 1984. The parties also executed a settlement agreement resolving the NLRB unfair practice complaint and the breach of agreement grievance. Local 208 thereafter withdrew the NLRB unfair labor practice charge and the grievance.

Subsequently, Southwest Administrators, Inc., the assignee of the Western Conference of Teamsters Pension Fund, filed this action against Rozay's Transfer under sections 502(a) and 515 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1132(a), 1145, to collect delinquent contributions for the period between May, 1982 and February, 1983.

Rozay's Transfer contended that its obligation to make pension fund contributions dated only from May 8, 1983, when the collective bargaining agreement was signed. Rozay's Transfer also filed a coun-

> terclaim seeking the return of $57,235.28 in contributions made to the trust between October, 1981 and April, 1982, the period between expiration of the old bargaining agreement and the date Rozay's Transfer ceased making payments.

791 F.2d at 771-72 (footnote omitted)

Following a bench trial, the district court in *Southwest Administrators* found that Rozay's Transfer had been "fraudulently induced" by Murrietta into signing the agreement and that there had been no "meeting of the minds" on the retroactive pension fund contributions. *Id.* at 772. Nonetheless, the district court concluded that the union's oral misrepresentation was not a defense to the trust fund's right to collect the contributions required by the express terms of the agreement. *Id.* Consequently, the district court entered judgment for Southwest Administrators for $76,133.29 in retroactive pension fund contributions, $15,226.25 in liquidated damages, $25,039.09 in interest, and $6,390.00 in attorneys' fees. *Id.*

On appeal, we affirmed. Relying on *Southern California Retail Clerks Union and Food Employers Joint Pension Trust Fund v. Bjorklund,* 278 F.2d 1262 (9th Cir. 1984), we held that while a union's misrepresentation that amounted to fraud in the execution could constitute a defense to a trust fund's subsequent collection action, a misrepresentation that amounted only to fraud in the inducement could not. *Id.* at 774. Concluding that the misrepresentation by the union went only to induce Rozay's Transfer to enter into the agreement, we held that the agreement was not "void", but merely "voidable" as against the trust fund. *Id.* at 775. Hence, we concluded that, regardless of the union's fraudulent inducement, Rozay's Transfer was still obligated to make the contribu-

tions to the pension trust fund required by the express terms of the agreement. *Id.*

Subsequent to the entry of judgment by the district court in the collection action brought by the trust fund, but prior to our decision in *Southwest Administrators*, Rozay's Transfer initiated a separate action against the union under section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185(a), for fraudulent inducement. After a bench trial, the district court concluded that the union was guilty of fraudulent misrepresentation in procuring the apparent assent of Rozay's Transfer to the March 8, 1983, agreement, and entered judgment in favor of Rozay's Transfer. In fashioning a "make whole" remedy, the district court (1) rescinded the March 8, 1983, agreement, (2) awarded Rozay's Transfer indemnification from the union for contributions owed to the trust fund as a result of the union's fraudulent misrepresentation, and (3) awarded Rozay's Transfer indemnification from the union for attorneys' fees and costs incurred by Rozay's Transfer in defending the *Southwest Administrators* litigation both at trial and on appeal. The union timely appealed.

On appeal, the union challenges virtually all the factual findings and legal conclusions underlying the district court's determination that the union is liable for fraudulent misrepresentation. Regarding the remedy awarded, the union challenges the district court's award of rescission and indemnification for contributions owed to the trust fund on both statutory and equitable grounds, and contests the propriety of awarding indemnification for the attorneys' fees and costs that Rozay's Transfer incurred in defending the *Southwest Administrators* lawsuit. We granted leave to the Southern California District Council of Laborers and International Union of Operating Engineers, Local Union No. 12, AFL-CIO (union's amicus) to

file an amicus brief on behalf of the union and to the Merchants and Manufacturers Association and the California Trucking Association (Rozay's Transfer's amicus) to file an amicus brief on behalf of Rozay's Transfer. In its amicus brief, the union's amicus objects to the district court's jurisdiction to hear this case.

II

Rozay's Transfer brought its action pursuant to section 301 of the LMRA which provides for district court jurisdiction over suits involving collective bargaining agreements. The union's amicus, however, contends that because the union's conduct in this case was arguably an unfair labor practice, the NLRB had exclusive primary jurisdiction over the claims of Rozay's Transfer.

The union's amicus correctly interprets *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959), as conferring exclusive primary jurisdiction on the NLRB over cases involving conduct that is arguably an unfair labor practice under section 8 of the National Labor Relations Act (NLRA), 29 U.S.C. § 158. Because the union's nondisclosure is arguably an unfair labor practice, insofar as it constituted a failure to bargain in good faith, the amicus reasons that the district court was deprived of jurisdiction by the *Garmon* preemption doctrine.

Although no one disputes that the union's conduct was arguably an unfair labor practice, the argument of amicus is incorrect as a matter of law. LMRA § 301 carves out a broad exception to the NLRB's primary jurisdiction for claims arising out of collective bargaining agreements, whether or not such claims would also be an unfair labor practice under section 8 of the NLRA. In cases involving conduct that is both an unfair labor practice and a

violation of a collective bargaining agreement, the NLRB and the district courts have concurrent jurisdiction. *See William E. Arnold Co. v. Carpenters District Council of Jacksonville*, 417 U.S. 12, 15-16 (1974). Section 301, moreover applies not only to suits for breach of a collective bargaining agreement once it is duly formed, but also to suits impugning the existence and validity of a labor agreement, *International Brotherhood of Electrical Workers, Local 532 v. Brink Construction Co.*, 825 F.2d 207, 212 (9th Cir. 1987); *John S. Griffith Construction Co. v. United Brotherhood of Carpenters and Joiners,* 785 F.2d 706, 712 (9th Cir. 1986) (in suit under LMRA § 301, district court has jurisdiction to determine the existence of a labor contract), including those alleging improper conduct or mistake during the formation of the agreement. *See, e.g., Operating Engineers Pension Trust v. Gilliam*, 737 F.2d 1501, 1503-05 (9th Cir. 1984) (fraud); *H. Prang Trucking Co. v. Local Union No. 469*, 613 F.2d 1235, 1238-39 (3d Cir. 1980) (mutual mistake of fact). Thus, we hold that the district court had jurisdiction under LMRA § 301 to entertain this action alleging fraudulent inducement in the formation of the agreement.

III

Unlike its amicus, the union does not dispute the district court's jurisdiction under section 301. Rather, the union contests the district court's legal determination that Rozay's Transfer was fraudulently induced by Murrietta's oral misrepresentation into signing the agreement. In addition, the union maintains that even if the district court's finding of fraud were correct, the relief that it awarded was improper. We now address the liability issues, dealing first with the challenge to factual findings and then to the conclusions of law.

A.

To establish a claim of fraudulent misrepresentation, Rozay's Transfer must prove that the union knowingly made a false representation concerning a material fact with the specific intent to deceive Rozay's Transfer and that Rozay's Transfer detrimentally relied upon the false representation, *See Pence v. United States,* 316 U.S. 332, 338 (1942); *Hart v. McLucas,* 535 F.2d 516, 519 (9th Cir. 1976). On the merits, the union challenges the district court's findings on each of these elements of fraudulent concealment, contending that the district court (1) erred in finding that the union committed a fraudulent misrepresentation with the specific intent to deceive Rozay's Transfer into signing the agreement, (2) erred in concluding that the alleged misrepresentation concerned a material fact, (3) erred in finding that Rozay's Transfer had detrimentally relied upon the fraudulent misrepresentation, (4) erred as a matter of law in concluding that Rozay's Transfer's reliance on Murrietta's representations was reasonable, and (5) erred as a matter of law in concluding that Rozay's Transfer would not have been contractually obligated to pay the delinquent pension contributions even had it not signed the agreement.

We review the district court's findings of fact, whether based on oral or documentary evidence, under the clearly erroneous standard, Fed. R. Civ. P. 52(a); *Cooling Systems and Flexibles, Inc. v. Stuart Radiator, Inc.*, 777 F.2d 485, 487 (9th Cir. 1985), while we review its conclusions of law de novo. *United States v. McConney,* 728 F.2d 1195, 1201 (9th Cir.) (en banc) (*McConney*), *cert. denied*, 469 U.S. 824 (1984). Moreover, we will not disturb the district court's interpretation of a contract that looks to extrinsic evidence of what the parties said and did unless it is

clearly erroneous. *Miller v. Safeco Title Insurance Co.*, 758 F.2d 364, 367 (9th Cir. 1985).

The district court's findings that Murrietta had the specific intent to induce Rozay's Transfer into signing the agreement and that Rozay's Transfer detrimentally relied on his misrepresentation are findings of historical fact that are reviewed for clear error. *See* Fed. R. Civ. P. 52(a); McConney, 728 F.2d at 1200. Particular deference is paid to the district court's credibility findings. *Anderson v. City of Bessemer City*, 470 U.S. 564, 579-80 (1985).

B.

[1]Notwithstanding the union's protestations to the contrary, there was ample evidence to support the district court's factual findings essential to its determination of fraud. The district court obviously found the testimony presented by Rozay's Transfer more credible than Murrietta's, and with good reason. There was ample testimony by the executives of Rozay's Transfer, and corroborating letters from Rozay's Transfer to the union, to show that the whole point of the settlement agreement was to afford Rozay's Transfer economic relief and that absent a waiver of the $76,133.29 in unpaid retroactive pension fund contributions, there would be no significant economic relief. Correspondence between Rozay's Transfer and the union reveals that the Rozay's Transfer trucking business had fallen on hard times, that it was operating in the red, and that to bring down costs to the point where it could begin operating profitably again, it had to decrease its employees' total compensation package. During its renegotiation of the agreement that expired on September 10, 1981, Rozay's Transfer consistently maintained that it could no longer afford to provide its employees with the same package of wages and benefits. Indeed, while the disputed agreement of March 8, 1983, provided that

Rozay's Transfer would resume pension fund contributions in the future at the approximate rate of $0.99 per hour, the side agreement offset the cost of such contributions by across the board wage reductions of $1.00 per hour and a waiver of five days' sick leave and two paid holidays.

More importantly, however, the trial evidence is entirely consistent with the district court's finding that Rozay's Transfer would not have signed the agreement if Rozay's Transfer had been aware that the agreement required it to pay retroactive pension fund contributions for the period between May 1982 and February 1983. The parties stipulated that on January 17, 1983, William Rozay (Rozay), President of Rozay's Transfer, met with Anderson and Murrietta to resolve a pending labor dispute between Rozay's Transfer and the union relating to the unilateral cessation of pension fund contributions by Rozay's Transfer for the period from May 1982 through February 1983. At this meeting, Anderson represented to Rozay that the trust fund had in the past forgiven other employers' unpaid pension fund contributions. Anderson told Rozay that he would see to it that the trust fund similarly forgive delinquent contributions of Rozay's Transfer for the period in question. During this same meeting, Murrietta told Rozay that he would write a letter to the trust fund on behalf of Rozay's Transfer requesting that the trust fund forgive the delinquent payments.

Sometime after this meeting, Rozay called Anderson and was assured that Anderson was doing "all that was necessary" to relieve Rozay's Transfer of any pension fund obligations for the period in question. On January 21, 1983, Rozay wrote a letter to Murrietta in which Rozay confirmed his understanding that "[n]o pension contributions will be required for the period April 1, 1982

through January, 1983." On January 26, 1983, Murrietta replied to Rozay's letter and also wrote to the trust fund requesting that it forgive the unpaid pension fund contributions of Rozay's Transfer.

[2] Subsequently, around March 4, 1983, Michael Uranga, an employee of the trust fund's administrators, informed Murrietta at a social function that the trust fund trustees had voted against forgiving the unpaid contributions of Rozay's Transfer. When Murrietta met again with Rozay on March 8, 1983, for the purpose of executing a new agreement between Rozay's Transfer and the union, Murrietta did not tell Rozay that the trust fund had already rendered an adverse decision on his request to forgive the unpaid contributions. Given this evidence, it was not clear error for the district court to infer that Rozay would not have signed the existing agreement knowing that it would be bound to make over $76,000 in retroactive pension fund contributions and that Murrietta concealed the trust fund's decision not to forgive the delinquent contributions because he realized that Rozay would not sign the contract if he knew of the decision. Hence, the district court's findings on specific intent and materiality are not clearly erroneous.

The union contends that the failure of Rozay's Transfer to seek to reopen negotiations with Murrietta or to rescind, reform, or amend the agreement after receiving the trust fund's letter dated March 24, 1983, denying his request to forgive delinquent contributions, proves that Rozay did not in fact detrimentally rely on Murrietta's misrepresentation, but, rather, indicates that Rozay's Transfer was satisfied with the bargain. It was not until the deposition of Uranga on April 30, 1984, however, when the contract had nearly expired, that Rozay's Transfer

first learned of Murrietta's fraud, and it was not until March 12, 1985, during the *Southwest Administrators* trial and after the contract had expired, that Murrietta finally confessed to his concealment.

[3] Moreover, the union's argument ignores the fact that during the dispute between Rozay's Transfer and the trust fund, Rozay's Transfer had initially maintained that Rozay and Murrietta had orally modified the provisions of the March 8, 1983, agreement relating to the retroactive contributions for the period in question. When Rozay's Transfer finally learned of Murrietta's fraud, it promptly interposed a contractual defense of fraudulent misrepresentation. These facts belie the union's contention that Rozay's Transfer was satisfied with the agreement even though it obligated Rozay's Transfer to make retroactive pension fund contributions. Rozay's Transfer never acquiesced to an agreement that required such payments. In view of this evidence, the district court could have properly concluded that Rozay's Transfer had in fact believed that Rozay and Murrietta had orally modified the express terms of the March 8, 1983, agreement, that the union would be able to use its influence to procure forgiveness of delinquent contributions, and that there was no basis for attacking its failure to do so until Rozay's Transfer learned of the fraud years later. It was therefore not clearly erroneous for the district court to find that Rozay had in fact relied detrimentally on Murrietta's misrepresentation despite the apparent inaction of Rozay's Transfer.

C.

In addition to attacking the district court's factual findings, the union also challenges its legal conclusions relating to the ingredients of fraudulent misrepresenta-

tion. In this appeal, the union does not contest that Murrietta's intentional failure to disclose the trust fund's adverse decision could constitute a fraudulent misrepresentation, and, therefore, we do not reach the question of whether a party has a duty to disclose material facts to another party during collective bargaining negotiations or whether a breach of such a duty will necessarily constitute actionable fraud.

1.

The union first contends that Rozay's reliance on Murrietta's misrepresentation was unreasonable as a matter of law. Obviously, as a question of law, we review this issue de novo. *See McConney*, 728 F.2d at 1201. Because the trust fund was not forbidden by law from forgiving delinquent contributions, we do not believe that an employer can never reasonably rely on a union's representations that it can influence favorable discretionary acts by the pension administrators. Because there was a commonality of interest between the union and the trust fund to further the welfare of the employees, it was not unreasonable as a matter of law for Rozay's Transfer to believe that the union could favorably influence the trust fund.

[4]The substance of the union's argument is that it is unreasonable as a matter of law for an employer to rely on a union's representations regarding its ability to influence a trust fund, because a union cannot bind a trust fund, nor does it have a legal duty to disclose to an employer any information concerning the employer's obligations to a trust fund. The cases that it cites for this broad proposition, however, do not address the question presented here — whether an employer may sue a *union* for its intentional misrepresentation of an existing material fact. *Chamberlin v. Bakery & Confectionery Union &*

Industry International Pension Fund, 99 L.R.R.M. 3176, 3177-80 (N.D. Cal. 1977), for example, involved a suit by a retired employee seeking to estop a *trust fund* from denying him benefits based upon a union representative's erroneous representation that he was eligible for such benefits. Because the trust had not made any misrepresentations, the union representative lacked apparent authority to bind the fund, and the terms of the collective bargaining agreement rendered the employee ineligible for benefits, the district court determined that the employee had not reasonably relied on a representation of the defendant, and denied relief. In the present case, in contrast, Rozay's Transfer bases its claim for relief against the *union* on the *union's* intentional failure to apprise it of the existence of a material fact: the trust fund's adverse decision. *Chamberlin,* which involves a suit against a *trust fund* based upon misrepresentations of a union representative, is thus inapplicable to the question of Rozay's reasonable reliance in this case. *See also Pension Trust v. Moine Brothers Excavators*, 124 L.R.R.M. 2031 (C.D, Cal. 1986) (trust fund not bound by union representative's misrepresentations).

In *Lucky Construction Co. v. Operating Engineers Local 12*, 4 E.B.C. 2521 (S.D. Cal. 1983), the district court held that an employer could not recover benefits paid to a trust fund from a union based upon a union agent's alleged verbal representation regarding the employer's obligations to the trust fund. The court determined that Lucky's reliance on the union's representation was unreasonable as a matter of law because it was charged with knowledge of its legal and contractual obligations set forth in the Master Labor Agreement and the trust agreements to which it was bound. Because the union had no power to modify these agreements, and because the union owed no duty to explain to Lucky its legal obligations under the

agreements, the union could not be liable for its negligent misrepresentations concerning Lucky's *legal* obligations under the agreements. *Id.* at 2523.

Lucky stands for the familiar proposition that an employer cannot reasonably rely on a union's erroneous representation regarding the scope of the *legal* obligations to a distinct entity of which the employer is presumably aware. This rule is inapplicable here. In the present case, Rozay's Transfer alleges that the union intentionally misrepresented a material *fact* by failing to disclose that its obligation to the trust fund would not be forgiven. Rozay's Transfer did not miscomprehend its legal obligations to the fund, rather, it misunderstood the state of facts, known to the union, existing at the time it entered into a separate agreement with the union. *Lucky* does not control this issue before us.

Similarly, in *Operating Engineers Pension Trust v. Cecil Backhoe Service, Inc.*, 795 F.2d 1501, 1507-08 (9th Cir. 1986), we held that a union owed an employer no duty to disclose that he was legally bound by a short form collective bargaining agreement that incorporated the terms of a master labor agreement requiring the employer to make contributions to an employee pension fund. *Cecil Backhoe*, like *Lucky*, however, is clearly distinguishable from the instant case. The union in that case had not led the employer to believe that its legal obligations would be anything other than those set forth in the written agreement, nor had the union intentionally concealed a material *fact. Id.* at 1508. Here, by contrast, Rozay's Transfer was affirmatively led to believe that the union would be able to exert its influence to see to it that its delinquent contributions were forgiven. In the present case, moreover, the information that the union failed to disclose did not pertain to *legal* consequences, which the employer is

presumed to understand. *See id.* at 1508 (the union committed no "wrong" by failing to disclose that the agreements applied to Cecil Backhoe's employees). Rather, the information pertained to a material *fact*, namely, that the trust fund had already refused to exercise its discretion to forgive the delinquent payments.

Here, we are bound by the district court's factual finding that at the time the parties signed the March 8, 1983, agreement, "there was no meeting of the minds between Rozay's and Local 208 on the issue of retroactive pension contributions." Further, we are bound by the district court's determination that "[t]he Trustees' decision on February 16, 1983, not to grant Rozay's relief from paying the retroactive pension contributions changed the essential character and nature of the agreement which Rozay's and Local 208 reached on January 17, 1983, and which agreement Mr. Rozay believed he was executing on March 8, 1983." Reviewed in the light of all the evidence that Rozay signed the agreement only because he believed that he was securing economic relief for his company, mainly through avoidance of the retroactive pension fund contributions for the period in question, we cannot say that these findings by the district court were clearly erroneous. Consequently, there having been no "meeting of the minds" between the parties on the issue of retroactive pension fund contributions, regardless of the apparent plain language of the agreement, it was not unreasonable as a matter of law for Rozay to rely on Murrietta's fraudulent misrepresentation prior to signing the March 8, 1983, agreement.

[5] While the union has cited no authority for the proposition that a union cannot be held liable to an employer for intentionally misrepresenting facts relevant to the employer's pension fund obligations during the

collective bargaining process, neither Rozay's Transfer nor its amicus have alerted us to any direct authority recognizing such liability on the part of the union. Rozay's Transfer's amicus, however, argues that because pension plans are a mandatory subject to bargaining and the employer must negotiate in good faith only through the union's chosen representative, it is untenable to hold that the union cannot be held liable for intentional misrepresentations regarding material facts relating to the employer's pension obligations. We find this argument persuasive.

First, as Rozay's Transfer's amicus correctly observes, the trustees are not collective bargaining agents and hence cannot negotiate pension fund provisions. *See NLRB v. Amax Coal Co.*, 453 U.S. 322, 334 (1981). Second, as the Seventh Circuit pointed out in *Battle v. Clark Equipment Co.*, 579 F.2d 1338, 1349 (7th Cir. 1978), *overruled on other grounds, Rupe v. Spector Freight Systems, Inc.*, 679 F.2d 685, 690 n.3 (7th Cir. 1982), an "employer cannot be held liable for . . . retroactive monetary relief when it relies in good faith on union actions or representations that are not obviously outside the scope of its authority." In that case, the employer had relied on the union's representations that its members had ratified certain amendments pursuant to properly conducted internal union procedures. *Id.* Although the present case involves the union's representations concerning its authority to induce the trust fund to forgive delinquent pension contributions, rather than internal union procedures, we do not believe that the union's ability to influence a discretionary act of the trust fund was "obviously outside the scope of its authority."

[6] Finally, the union has cited no authority or sound legal principle, nor can we discern any, explaining why

rules pertaining to fraudulent inducement should not apply to the formation of labor contracts. Hence, we do not find it unreasonable as a matter of law for Rozay's Transfer to have relied on the union's assurances that it could convince the trust fund to act favorably on the petition of Rozay's Transfer.

2.

Next, the union argues that because Rozay's Transfer would have been obligated to make the pension contributions even had it not signed the agreement, Murrietta's misrepresentation could not have been "material" to Rozay's decision to sign the agreement. We interpret this materiality contention as a "causation" argument. The union is really arguing that if Rozay's Transfer were legally obligated to make the retroactive contributions whether or not Rozay signed the March 8, 1983, agreement, then Murrietta's misrepresentation could not have been the cause-in-fact of the injury to Rozay's Transfer. Causation is ordinarily a question of fact that is reviewed for clear error. *See Armstrong v. United States*, 756 F.2d 1407, 1409 (9th Cir. 1985.) But whether or not there was a prior legal obligation to make such payments absent a valid, signed collective bargaining agreement is a mixed question of fact and law that requires us to assess whether legal duties arise under a given set of facts. Accordingly, we review this issue de novo, *See McConney*, 728 F.2d at 1201-02.

[7] The union marshals two main arguments in support of its contention that Rozay's Transfer would have been obligated to make the payments even had it refused to sign the March 8, 1983, agreement. Initially, the union argues that as of November 1981, "[t]he undisputed material facts in this case disclose" that the parties had

reached a mutual agreement on a new contract and that the refusal by Rozay's Transfer to sign it did not prevent the agreement from going into effect. We find no merit in this claim. The record discloses neither a stipulation by Rozay's Transfer, nor a finding by the district court that a binding agreement was reached in November of 1981. On the contrary, the record reveals that while the parties had reached a tentative agreement on the terms of a successor agreement, which the union was to incorporate into a written draft, Rozay's Transfer did not receive a draft until April 18, 1982. On May 6, 1982, Rozay's Transfer returned to the union the draft unsigned to make certain corrections, but the union never responded. Because Rozay's Transfer had experienced severe financial problems during the interim, on this same day it informed the union that a reduction in labor costs, including termination of pension benefits, was required if Rozay's Transfer were to remain in business. Indeed, on both June 11, 1982, and June 28, 1982, Rozay's Transfer sent certified letters to the union proposing, among other things, cessation of pension contributions. On neither occasion did the union respond. In view of the union's inaction, the failure of the parties formally to execute the tentative November 1981 agreement, and the clearly expressed intent of Rozay's Transfer to modify this agreement in light of changed circumstances, we fail to see how a binding agreement came into effect as of November 1981.

In presenting its first causation argument, the union reads our prior decision in *Southwest Administrators* as holding that Rozay's Transfer was still contractually obligated to pay the delinquent contributions even if the March 8, 1983, labor contract were rescinded for fraud. However, while we recognized in *Southwest Administrators* that Murrietta's fraud did not render the agreement void as to the obligations of Rozay's Transfer to the trust

fund, 791 F.2d at 774-75, this holding has no bearing on the question of causation in this action. Just because Rozay's Transfer is contractually obligated to the trust fund does not answer the question whether the union caused Rozay's Transfer to assume this obligation. We did not suggest in *Southwest Administrators* that Rozay's Transfer could not seek redress against the union in a separate action. Indeed, we suggested that the proper remedy for Rozay's Transfer might lie in an action for indemnification against the union. *See id.* at 777 n.4.

[8] In the second branch of its "causation" agreement, the union maintains that even if the parties had not negotiated any new labor agreement after the old one had expired in September 1981, Rozay's Transfer would nonetheless have remained statutorily obligated under the NLRA to continue paying into the pension fund throughout the period in question. The union relies on *NLRB v. Carilli*, 648 F.2d 1206, 1213-14 (9th Cir. 1981), which held that until the parties negotiate a new agreement or bargain in good faith to impasse, the employer is required to maintain the status quo under the expired collective bargaining and trust agreements, including payments to pension trusts. *Accord Southwest Administrators*, 791 F.2d at 776. Rozay's Transfer, however, does not interpret our decision in *Carilli* as imposing a general obligation on the employer to maintain the terms of an expired collective bargaining agreement pending renegotiation. Instead, it reads *Carilli* as holding only that an employer *may* continue to contribute to a pension trust fund following expiration of a collective bargaining agreement without violating section 302(c)(5) of the LMRA, which forbids such payments in the absence of an express, written agreement. Just because an employer *may* continue contributing to a pension trust fund following the expiration of a collective bargaining agreement, Rozay's Transfer

argues, does not mean that a trust fund has the *right* to sue to collect such contributions during this period.

[9] After giving this argument careful consideration, we reject such a narrow interpretation of our holdings in *Carilli* and *Southwest Administrators*. Our cases have long established that upon expiration of a collective bargaining agreement, an employer has a duty to continue the status quo until the parties bargain to impasse or reach a new agreement, *Southwest Administrators,* 791 F.2d at 776-77. By unilaterally changing the status quo before that time, the employer commits an unfair labor practice in violation of NLRA § 8(a)(5) (failure to bargain in good faith). *See, e.g., Laborers Health & Welfare Trust v. Advanced Lightweight Concrete.* 779 F.2d 497, 500 (9th Cir. 1985) (*Advanced Lightweight*), *aff'd,* 108 S.Ct. 830 (1988). This obligation to maintain the status quo under the expired labor agreement applies with equal force to the obligation to continue contributing to a pension trust fund. *Southwest Administrators,* 791 F.2d at 776-77; *Peerless Roofing Co. Ltd. v. NLRB,* 641 F.2d 734, 736 (9th Cir. 1981).

Further, this obligation to continue making pension fund contributions is legally enforceable. While the Supreme Court just recently held that the district courts do not have jurisdiction under ERISA over a suit brought by a pension trust fund to recover delinquent contributions due after expiration of a collective bargaining agreement, it also recognized that a pension trust fund could seek to enforce this obligation by filing an unfair labor practice charge before the NLRB. *See Advanced Lightweight,* 108 S.Ct. at 837-38; *see also Advanced Lightweight,* 779 F.2d at 500-02.

[10] That section 8(a)(5) creates an enforceable obligation on the part of an employer to continue pension fund contributions pending renegotiation of an expired

collective bargaining agreement belies the claim of Rozay's Transfer that an employer is permitted, but cannot be required by the trust fund, to make such contributions during this hiatus. Rozay's Transfer did not allege, nor did the district court find, that the parties had bargained to impasse. Given this interpretation, we turn to the question of whether Rozay's Transfer would have been obligated to make the contributions "but for" Murrietta's misrepresentations.

[11] One might read our prior decision in *Southwest Administrators* as suggesting that Rozay's Transfer had an independent legal obligation to make the payments. *See* 791 F.2d at 776-77. Nonetheless, we remain unpersuaded by the union's argument that notwithstanding Murrietta's alleged misrepresentation, Rozay's Transfer would still have been legally obligated to make the pension fund contributions for the period in question. During oral argument, Rozay's Transfer suggested the basis of our reasoning. The gravamen of its contention is that, even assuming that it would otherwise have been obligated to make the retroactive contributions while awaiting negotiation of a new labor agreement, the parties in fact reached a new agreement on January 17, 1983, extinguishing any incipient obligation to make retroactive contributions. We find this argument convincing. For even if we were to find that Rozay's Transfer were legally obligated under the NLRA to continue the pension contributions all along, the union was free to bargain away such a right through the collective bargaining process. *See American Distributing Co. v. NLRB,* 715 F.2d at 446, 449-50 (9th Cir. 1983) (*American*), *citing NLRB v. C&C Plywood Corp.,* 385 U.S. 421, 430-31 (1967). The employer's obligation to maintain the status quo is therefore merely presumptive in the sense that it can be discharged through the bargaining process. Waivers of union's right

under the NLRA can occur "by express contractual provisions, by bargaining history, or by a combination of the two." *American,* 715 F.2d at 450. Thus, it is not true as a matter of law that absent Murrietta's fraud, Rozay's Transfer would still have remained liable for pension fund obligations under the expired labor contract. The parties by express provision in a new agreement could always have extinguished this obligation. We see no reason why this could not be done retroactively. *See Advanced Lightweight,* 108 S. Ct. at 838 ("the employer and the union may enter into a settlement that either reduces, or even might waive, the employer's postcontract obligations to contribute to the pension fund").

[12] Moreover, that the parties would have agreed to such terms is not sheer conjecture at this stage. We observe that the contract as executed did not contain such a term, apparently because "the parties believed it was not possible simply to draft a collective bargaining agreement providing for prospective-only payment of contributions to the pension fund." *Southwest Administrators,* 791 F.2d at 771 n.1. The union may have been constrained in its bargaining because "[i]t was the established policy of the Western Conference of Teamsters Pension Trust Fund not to accept contributions made under any collective bargaining agreement which provided for a 'gap' in contributions. Thus, when a collective bargaining agreement expired, in order for the employer to be reinstated in the trust fund, the new agreement had to provide for the payment of contributions for the interim between the two agreements." *Id.* at 771-72 n.1. Even so, union officials clearly evinced by their words and actions their intent to free Rozay's Transfer from the burden of making retroactive pension fund contributions for the period in question. Indeed, the district court found that on January 17, 1983, Rozay's Transfer and the union agreed

to "the resumption of the payment of pension contributions *prospectively*." (Emphasis added.) Although at this time, the district court did not find that the parties agreed specifically to a waiver of *retroactive* pension fund obligations, it found that Anderson represented to Rozay that the trust fund had forgiven unpaid pension contributions of other employers in the past and that he would ask the trust fund likewise to waive the unpaid contributions for the period from May 1982 to February 1983. Further, the district court found that four days later, on January 21, 1983, Rozay sent Murrietta a letter confirming the terms of the January 17, 1983, agreement, in which Rozay articulated his understanding that, under the new agreement, retroactive contributions would not be required. In his reply to this letter, Murrietta did not express any disagreement or objection to Rozay's understanding that there would be no retroactive pension contributions. Hence, we agree with the district court that Murrietta's fraud deprived Rozay's Transfer of the opportunity to negotiate away any continuing legal obligation to make the retroactive payments — a result that was clearly intended by the parties' words and course of conduct during the negotiations that culminated in the January 17, 1983, settlement agreement.

We recognize that despite the union's desire to relieve the obligation of Rozay's Transfer to make the retroactive payments, the union may have believed that it could not include such a term in the new agreement, because of the trust fund's policy against allowing gaps in coverage. Had the parties reached impasse, or had the union agreed retroactively to abolish the delinquent contributions to the trust fund, the trust fund's exclusive remedy, if any, would have been to file an unfair labor practice charge under the NLRA to compel payment of the delinquent contributions. The district court found that the direct

consequence of Murrietta's fraud was to induce Rozay's Transfer to sign an agreement that provided for the payment of these delinquent contributions to the trust fund. Without this agreement, the trust fund would not have been able to pursue its prior action under section 515 of ERISA, 29 U.S.C. § 1145, to collect these contributions, for an action under section 515 is available only to collect "promised contributions." *Advanced Lighweight*, 108 S. Ct. at 832. As the Supreme Court observed, an ERISA collection action generally provides a more effective remedy for the trust fund than an unfair labor practice proceeding under the NLRA, *See id.* at 838. This is true, in part, because in an action under the NLRA, the union and the employer can always enter into a settlement waiving the employer's post-contract obligations to contribute to a pension fund. *Id.* It is thus clear that Murrietta's fraud is the cause-in-fact of the liability of Rozay's Transfer to the trust fund in the *Southwest Administrators* case.

IV

The union and the union's amicus also raise three objections to the remedy that the district court granted: (1) the simultaneous award of rescission and indemnification exceeded the district court's authority under section 301, (2) indemnification for the amount of the judgment entered against Rozay's Transfer in *Southwest Administrators* was improper because Rozay's Transfer could have "reasonably and prudently" avoided incurring the judgment in that case, and (3) indemnification for the attorneys' fees incurred by Rozay's Transfer in *Southwest Administrators* was improper because the defense of Rozay's Transfer in that case was legally meritless as against the trust fund in both the district court and on

appeal and because Rozay's Transfer did not first provide the union with the opportunity to defend Rozay's Transfer against the trust fund in the prior case.

A.

The union's amicus argues that by awarding indemnification and damages as the remedy, the district court exceeded its authority under section 301, the sole jurisdictional basis invoked. According to amicus, section 301 permits only an action for rescission for fraudulent inducement, leaving an award of indemnification or damages for common law fraud beyond the district court's remedial power. Implicit in this argument is the assumption that section 301 permits only contractual-type remedies and that while granting both rescission and *restitution* is a proper contractual remedy, granting both rescission and *indemnification* is not. Because the inability of the district court as a matter of law to rescind the obligation running from Rozay's Transfer to the trust fund makes it impossible literally to restore the parties to their *status quo ante,* the union correctly asserts that the district court's "make-whole" remedy following its order of rescission is more properly characterized as indemnification than as restitution.

[13] Nonetheless, how this court chooses to characterize the remedy granted in this case and whether simultaneously granting rescission and indemnification is a proper "contractual" remedy are irrelevant to the district court's remedial authority under section 301. The union's amicus points to no authority holding that a claim for equitable indemnity or other noncontractual relief is not cognizable under section 301. Contrary to its suggestion that section 301 strictly limits the remedial power of the federal courts, the Supreme Court has construed section

301 as "a congressional mandate to the federal courts to fashion a body of federal common law to be used to address disputes arising out of labor contracts," *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985) (footnote omitted); *see Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957). In *Lincoln Mills*, the Court held that section 301 allows courts to fashion remedies even though lacking in express statutory sanction and that "[t]he range of judicial inventiveness [under section 301] will be determined by the nature of the problem." 353 U.S. at 457; *see also Bowen v. United States Postal Service*, 459 U.S. 212, 222 (1983) (*Bowen*) ("of paramount importance is the right of the [injured party] . . . to be made whole"); *Black-Clawson Co., Inc. v. International Association of Machinists*, 313 F.2d 179, 182 (2d Cir. 1962) (*Black-Clawson*) (legislative history of section 301's predecessor contemplates "not only the ordinary lawsuits for damages but also such other remedial proceedings, both legal and equitable, as might be appropriate in the circumstances"). Recognizing that "[t]he label attached to the remedy as tort or contract is not dispositive of the scope of federal common law which under section 301(a) it is our responsibility to create," the Third Circuit in *Wilkes-Barre, Publishing Co. v. Newspaper Guild of Wilkes-Barre, Local 120*, 647 F.2d 372, 381 (3d Cir. 1981), *cert denied*, 454 U.S. 1143 (1982), held that a claim for tortious interference with a labor contract was proper under section 301.

[14] Other courts have similarly allowed tort-like, "make-whole" remedies similar to the one fashioned by the district court for breach of contract and breach of duty of fair representation claims under section 301. These remedies have included awards for back pay and future losses, Thompson v. *Brotherhood of Sleeping Car Porters*, 367 F.2d 489, 492-93 (4th Cir. 1966), *cert. denied*,

386 U.S. 960 (1967), compensatory damages, *see Bowen*, 459 U.S. at 222, and attorneys' fees, *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270, 1275-76 (9th Cir. 1983) (*Dutrisac*). In analogous cases of union misconduct, this court has affirmed an award imposed by the NLRB requiring a union to make an employer whole for financial expenditures coerced from the employer in violation of the NLRA. *See Graphic Arts International Union, Local No. 280 v. NLRB*, 596 F.2d 904, 910 (9th Cir. 1979) (*Graphic Arts International*); *NLRB v. Warehousemen's Union Local 17*, 451 F.2d 1240, 1243 (9th Cir. 1971) (upholding Board remedial order requiring union to make employer whole for financial expenditures made by employer as result collective bargaining agreement). The NLRB's "broad discretion in fashioning remedies to effectuate the policies of the NLRA in light of the circumstances of each case," *Graphic Arts International*, 596 F.2d at 910, justified its award of "make-whole" remedies in these cases of union unfair labor practices. No reason has been provided to suggest why, by analogy, the federal district courts' broad remedial powers under section 301 should not similarly invest them with the power to devise "make-whole" remedies, "both legal and equitable, as might be appropriate in the circumstances." *Black-Clawson*, 313 F.2d at 182. Hence, there is no sound reason why section 301 should bar the district court from simultaneously awarding a remedy of rescission and indemnification for the union's fraudulent inducement in order to make the employer "whole."

B.

Taking a different tack, the union next maintains that Rozay's Transfer could have "reasonably and prudently"

avoided the judgment entered against it in *Southwest Administrators* if it had done either of two things. First, it argues that Rozay's Transfer could have contacted the union after learning of the trust fund's unfavorable decision by mail on March 24, 1983, for the purposes of reopening negotiations or amending the agreement. We construe this as a claim that Rozay's Transfer failed to take steps to mitigate its damages. At that time, however, Rozay's Transfer was unaware of any grounds that would have entitled it to reopen negotiations or modify the March 8, 1983, agreement. Murrietta's fraud was not revealed until much later. Further, the union's position in the instant case is completely inconsistent with a desire on its part to renegotiate or amend the March 8, 1983, labor contract to reflect Rozay's Transfer's mistaken understanding of that agreement.

[15] Second, the union suggests that Rozay's Transfer was tardy in waiting over a year before formally notifying the union of the collection action initiated by the trust fund on June 20, 1983. This claim is contrary to the record. While Rozay's Transfer did not file its complaint against the union in this case until after September 26, 1984, the union had actual notice of the *Southwest Administrators* trial from its outset. Moreover, the union does not explain how notice of the trust fund's action against Rozay's Transfer would have resulted in mitigation of damages. Union officials, after all, testified *against* Rozay's Transfer in the *Southwest Administrators* litigation.

[16] Third, the union alleges that had Rozay's Transfer promptly conducted discovery in that case, it would have uncovered Murrietta's fraudulent conduct, and could then have moved at an earlier date to serve a third party complaint against the union seeking rescission.

There is, however, no evidence in the record that Rozay's Transfer was remiss or dilatory in conducting discovery. In addition, we held in *Southwest Administrators* that because ERISA was intended to provide "a streamlined and simplified procedure for employee benefit trust funds to collect delinquent contributions," the district court reasonably denied Rozay's application to implead the union. 791 F.2d at 777. The strong policy in favor of avoiding complicated, lengthy trials in ERISA collection actions suggests to us that impleader might well have been denied at any stage of the *Southwest Administrators* proceedings. Moreover, even if the union had been joined as a third party defendant, Rozay's Transfer still would have been adjudged liable to the trust fund, although it then could have simultaneously sought indemnification from the union. In either event, Rozay's Transfer would not have avoided its primary liability to the trust fund.

C.

The union also attacks that part of the district court's judgment indemnifying Rozay's Transfer for the attorneys' fees and costs that it incurred in litigating the *Southwest Administrators* case at both the district court and circuit court level. An award of attorneys' fees on the grounds of bad faith is a matter committed to the district court's discretion and will not be reversed absent an abuse of discretion. *Beaudry Motor Co. v. ABKO Properties, Inc.*, 780 F.2d 751, 756 (9th Cir. 1986) (*Beaudry Motor*).

According to the union, the theory of defense at trial of Rozay's Transfer and on appeal in *Southwest Administrators* was frivolous and, moreover, Rozay's Transfer failed to provide the union the first opportunity to defend Rozay's Transfer. Therefore, the union reasons, the dis-

trict court should not have ordered it to indemnify Rozay's Transfer for the attorneys' fees and costs incurred in defending *Southwest Administrators*. We find these arguments to be patently without merit. Merely because a party ultimately loses does not mean that its defense was not in good faith. Indeed, our lengthy discussion of the defense of Rozay's Transfer in *Southwest Administrators* recognized the force of its position, although we were compelled ultimately to reject it as a matter of law. Moreover, the union's apparent fraud was not the only good faith defense that Rozay's Transfer raised in the prior case. *See* 791 F.2d at 775. Last, we know of no authority that requires the victim of intentional fraud to request its defrauder to defend it in a suit brought by a third party. Particularly in this case, the conflicting interests between Rozay's Transfer and the union would have counseled against allowing the union to defend Rozay's Transfer in the prior lawsuit. The union would hardly have been willing to admit to the fraud of its own agent, thereby subjecting itself to potential liability. Nor could one expect it vigorously to take a position in conflict with the best interests of its members by arguing that Rozay's Transfer was not obligated to make the retroactive pension fund contributions. Indeed, as we have previously observed, the union actively sided with the trust fund in the *Southwest Administrators* litigation.

[17] The award of attorneys' fees and costs in this case merely compensates Rozay's Transfer for one aspect of its out-of-pocket expenses attributable to the union's fraud. Case law supports awarding attorneys' fees and costs where such expenses were incurred as a result of the defendant's own misconduct. *See e.g., Dutrisac*, 749 F.2d at 1275-76 (holding that award of attorneys' fees in a section 301 suit is proper where fees reimburse an employee for union's failure to represent him at a hearing);

Moe v. Transamerica Title Insurance Co., 21 Cal.App. 3d 289, 303 (1971) (one who is required by another's tort to defend an action brought by a third party is entitled to recover attorneys' fees on that action, even if unsuccessful). Such an award by the district court is also consistent with the rule that allows a court to award attorneys' fees against a party whose conduct resulting in a lawsuit constituted fraud or who otherwise acted in bad faith. *See F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974); *Beaudry Motor*, 780 F.2d at 756; *Dogherra v. Safeway Stores, Inc.*, 679 F.2d 1293, 1298 (9th Cir. 1982), *cert. denied*, 459 U.S. 990 (1982). The union's claim that under *Weston v. Globe Slicing Machine Co.*, 621 F.2d 344, 349 (9th Cir. 1980), an indemnitee cannot recover its attorney's fees from an indemnitor absent an express contractual provision ignores the fact that *Weston* was a diversity action applying Idaho law, and, moreover, that it did not involve, as in this case, the commission of an intentional tort by the indemnitor.

[18] Thus, the district court did not abuse its discretion by awarding Rozay's Transfer the attorneys' fees and costs that it incurred in defending the *Southwest Administrators* lawsuit.

V

Under section 301 of LMRA, the district court had jurisdiction to entertain this action against the union for fraudulently inducing Rozay's Transfer into signing the March 8, 1983, agreement. On the merits, we hold that in finding the union liable for fraudulent misrepresentation, the district court's findings of fact were not clearly erroneous and its conclusions of law are correct in light of our precedents. Regarding the "causation" issue, we find that under the facts of this case, the fraud interfered with

the ability of Rozay's Transfer to bargain for an agreement extinguishing its obligation to make the retroactive pension fund contributions in question even had it not signed the March 8, 1983, agreement. Were it not for Murrietta's oral misrepresentations, Rozay would not have signed the agreement, and without his signature, Rozay's Transfer could have avoided any liability to the trust fund for retroactive pension fund contributions. Thus, we affirm the district court's finding that "but for" the union's fraud, Rozay's Transfer would not have been liable for these contributions. We also find that the district court's simultaneous rescission of the March 8, 1983, agreement and indemnification award for the judgment rendered against Rozay's Transfer in the *Southwest Administrators* case is authorized under section 301 and that the district court did not abuse its discretion by including the attorneys' fees and costs incurred by Rozay's Transfer in defending that previous action.

AFFIRMED.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On September 22, 1988, I served the within Petition for Writ of Certiorari in re: "Local Freight Drivers vs. Rozay's Transfer" in the United States Supreme Court October Term 1988 No.....

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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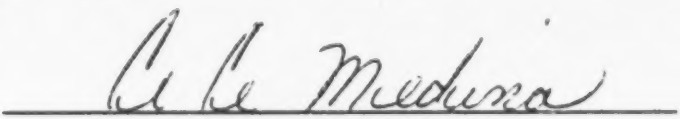
All Parties required to be served have been served.

I certify under penalty of perjury, that the foregoing is true and correct.

Executed on September 22, 1988, at Los Angeles, California.



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